

No. 94255-2

WASHINGTON STATE SUPREME COURT

CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY, a regional transit authority, dba SOUND TRANSIT,

Respondent,

and

WR-SRI 120TH NORTH LLC,
a Delaware limited liability company; et al.,

Appellants.

BRIEF OF RESPONDENT SOUND TRANSIT

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RESTATEMENT OF ISSUES PRESENTED	2
III. STATEMENT OF THE CASE.....	3
A. SOUND TRANSIT AUTHORIZING LEGISLATION	3
B. RESOLUTION R2013-21 TO ACQUIRE PROPERTY FOR EAST LINK.....	3
C. PROCEDURAL HISTORY.....	4
D. RELATED CASES.....	5
1. The Jacobsen Case	6
2. The Sternoff Case	7
3. The Safeway Case.....	7
4. The Spring District Cases	8
IV. ARGUMENT.....	9
A. SOUND TRANSIT’S ENABLING STATUTE GRANTS IT AUTHORITY TO CONDEMN PUBLIC PROPERTY.....	9
B. CITY LIGHT’S EASEMENT IS NECESSARY FOR THE PROJECT	18
C. THE PRIOR PUBLIC USE DOCTRINE PERMITS THIS CONDEMNATION	25

TABLE OF CONTENTS
(continued)

	Page
D. SEATTLE'S STATUS AS A HOME RULE CHARTER CITY IS IRRELEVANT TO THIS LAWSUIT.....	28
V. CONCLUSION.....	30

TABLE OF AUTHORITIES

	Page(s)
State Cases	
<i>Central Puget Sound Regional Transit Authority v. Miller</i> , 156 Wn.2d 403, 128 P.3d 588 (2006)	18, 19, 20, 22
<i>City of Bellevue v. Pine Forest Properties, Inc.</i> , 185 Wn. App. 244, 340 P.3d 938 (2014), <i>rev. denied</i> , 183 Wn.2d 1016 (2015)	22
<i>City of Seattle v. Loutsis Inc. Co., Inc.</i> , 16 Wn. App. 158, 554 P.2d 379 (1976)	23, 24
<i>City of Tacoma v. State</i> , 121 Wash. 448, 453, 209 P. 700 (1922).....	26
<i>City of Tacoma v. Welcker</i> , 65 Wn.2d 677, 399 P.2d 330 (1965)	17, 20
<i>Davis v. State ex rel. Department of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999)	11
<i>State ex rel. Devonshire v. King County</i> , 70 Wn.2d 630, 424 P.2d 913 (1967)	16
<i>HTK Management, L.L.C. v. Seattle Popular Monorail Authority</i> , 155 Wn.2d 612, 121 P.3d 1166 (2005)	20
<i>In re Port of Seattle</i> , 80 Wn.2d 392, 398, 495 P.2d 327 (1972)	24

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>King County v. City of Seattle</i> , 68 Wn.2d 688, 414 P.2d 1016 (1966).....	13, 14, 15
<i>King County v. Olson</i> , 7 Wn. App. 614, 501 P.2d 188 (1972).....	24
<i>Newell v. Loeb</i> , 77 Wash. 182, 137 P. 811 (1913).....	15, 16
<i>Petition of Port of Grays Harbor</i> , 30 Wn. App. 855, 638 P.2d 633 (1982).....	17
<i>Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC (NAFTZI)</i> , 159 Wn.2d 555, 151 P.3d 176 (2007).....	20, 22, 23
<i>Public Utility District No. 1 of Okanogan County v. State</i> , 182 Wn.2d 519, 342 P.3d 308 (2015).....	25, 27
<i>Rest. Dev., Inc. v. Cananwill</i> , 150 Wn.2d 674, 80 P.3d 598 (2003).....	10
<i>Roberts v. City of Seattle</i> , 62 Wash. 573, 116 P. 25 (1911).....	25, 26
<i>Sound Transit v. Ann Senna Jacobsen, et al.</i> , King County Cause No. 16-2-06769-7 SEA.....	6

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Sound Transit v. Safeway Inc.</i> , King County Cause No. 16-2-09223-3 SEA.....	7
<i>Sound Transit v. Sternoff L.P.</i> , King County Cause No. 16-2-0880-7 SEA.....	7
<i>Sound Transit v. WR-SRI 120th North LLC</i> , King County Cause No. 17-2-12144-4 SEA.....	8
<i>State v. McDonald</i> , 98 Wn.2d 521, 656 P.2d 1043 (1983).....	28
<i>State ex rel. Hunter v. Superior Court for Snohomish</i> <i>County</i> , 34 Wn.2d 214, 208 P.2d 866 (1949).....	17
<i>Stone v. Chelan County Sheriff's Dep't</i> , 110 Wn.2d 806, 756 P. 2d 736 (1988).....	11
<i>Washam v. Sonntag</i> , 74 Wn. App. 504, 874 P.2d 188 (1994).....	29
 State: Statutes, Rules, Regulations, Constitutional Provisions	
RCW 8.08.010	13
RCW 81.112.010	12, 17, 18

TABLE OF AUTHORITIES
(continued)

	Page(s)
RCW 81.112.080	10, <i>passim</i>
RCW 81.112.080(2).....	3, 9, 16
RCW chapters 81.104 and 81.112	3
Other Authorities	
1A NICHOLS ON EMINENT DOMAIN § 2.17 at 2-58 (Julius L. Sackman ed., 3d ed. 2006).....	25

I. INTRODUCTION

This is an eminent domain action. Respondent Sound Transit is condemning certain interests in property located at 1121 124th Avenue Northeast, in Bellevue, Washington for the East Link Extension of its Link light rail project, which will bring light rail to Bellevue. The light rail trackway will be constructed to run along and through the northern end of the property.

The property is bordered on the east by 124th Ave NE. Appellant, Seattle City Light (“City Light”), holds a power line easement (the “Easement”) that is part of an easement corridor that runs along 124th Ave NE, bisecting the City of Bellevue, in the area of the property. City Light claims that as a public entity holding an interest in property located in Bellevue, it has the right to block the East Link Extension.

The trial court disagreed and entered Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and Necessity as to Respondent City of Seattle on February 13, 2017 (the “PU&N Judgment”). The PU&N Judgment held that Sound Transit had statutory authority to condemn public property, and found that the property was necessary for the project.

Sound Transit requests that the Court affirm the PU&N Judgment.

II. RESTATEMENT OF ISSUES PRESENTED

1. Sound Transit's enabling statute grants it broad eminent domain authority to acquire "all" property necessary to construct and operate a regional transit system. Does City Light's status as a public entity prevent Sound Transit from condemning portions of City Light's Easement to construct and operate its regional light rail project?

2. An agency's determination that property is necessary for a public use does not require absolute, indispensable, or immediate need and is conclusive unless the party opposing condemnation shows the determination was arbitrary and capricious, amounting to constructive fraud. The trial court found Sound Transit's necessity determination was not arbitrary and capricious amounting to constructive fraud. Has City Light shown grounds to reverse the Trial Court's necessity finding?

3. The prior public use doctrine allows condemnation of public property whose current use is compatible with or inferior to the proposed use. Competing public uses are compatible when the proposed public use will not destroy the existing use or interfere with it to an extent tantamount to destruction. Does the prior public use doctrine prohibit the condemnation when Sound Transit's project will not destroy City Light's existing easement use?

III. STATEMENT OF THE CASE

A. SOUND TRANSIT AUTHORIZING LEGISLATION

Sound Transit is a Regional Transit Authority under RCW chapters 81.104 and 81.112. CP 9. RCW 81.112.080(2) grants Sound Transit broad condemnation authority to support high capacity transportation facilities such as light rail lines. It allows Sound Transit to "acquire by purchase, condemnation, gift, or grant and to lease, construct, add to, improve, replace, repair, maintain, operate, and regulate the use of high capacity transportation facilities and properties ... together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems." By granting Sound Transit the power to condemn "all" property necessary for its high capacity transportation system, the legislature vested Sound Transit with the power to condemn public, as well as private, land to construct, operate and maintain, its project.

B. RESOLUTION R2013-21 TO ACQUIRE PROPERTY FOR EAST LINK

In September 2013, Sound Transit passed Resolution R2013-21, which authorized condemnation proceedings to "acquire all, or any portion" of the property that is the subject of this eminent domain action (the "Parcel") "for the purpose of constructing, owning, and operating a

permanent location of the East Link Extension and light rail guideway."

CP 11.

City Light's interest in the Parcel is an electrical transmission line easement running along the east side of the Parcel, which is part of an easement corridor that runs north and south, and spans both the east and west sides of 124th Avenue NE. CP 1043. The portion of the easement corridor along the east side of the Parcel (west of 124th Avenue NE) (the "Easement") is currently utilized for a 230 kV electrical transmission system. CP 1043.

C. PROCEDURAL HISTORY

In this action, filed on January 17, 2017, Sound Transit seeks to condemn portions of the Parcel for the location, construction, operation, and maintenance of the East Link Extension. CP 2. The Petition states that in order to permanently locate, construct, operate and maintain the East Link Extension and its related facilities, Sound Transit must condemn certain property rights, and enumerates the property interests to be taken, which are all within the property identified as necessary for the East Link Extension to Sound Transit's Link light rails system in R2013-21. CP 2-3.

Sound Transit engaged in lengthy discussions with City Light regarding its transmission line easements along 124th Ave NE and the light rail project, hoping that the two public entities could reach a negotiated

resolution without the need for litigation. CP 1060.¹ After filing its Petition in Eminent Domain, Sound Transit moved for an order and judgment of public use and necessity regarding City Light's Easement. CP 1106-1115. City Light opposed the motion, contending that Sound Transit “lacks the statutory authority to condemn property owned by Seattle.” CP 1242. After extensive briefing and submissions of written evidence, the trial court entered the PU&N Judgment, which found that Sound Transit has authority to condemn publicly owned property, including City Light's Easement, and that the Easement was necessary for the East Link Extension. CP 1276-1281.

City Light immediately filed a Notice of Appeal from the PU&N Judgment. CP 3125-3127. Shortly thereafter, City Light filed its Statement of Grounds for Direct Review with this Court, and Sound Transit answered. City Light’s request for direct review remains pending, and the parties have proceeded to brief the issues on the merits.

D. RELATED CASES

In addition to this case, City Light and Sound Transit are litigating four related cases, each involving a parcel at the same Bellevue intersection as the Parcel, each involving the same City Light easement corridor, and each raising the same issues.

¹ See Declaration of Larry J. Smith, *infra* n.2.

1. *The Jacobsen Case*

In *Sound Transit v. Ann Senna Jacobsen, et al.*, King County Cause No. 16-2-06769-7 SEA (“*Jacobsen*”), City Light opposed Sound Transit’s Motion for Public Use and Necessity on the same grounds it raises here: that Sound Transit lacked authority to condemn public property, that the proposed condemnation would render City Light’s Easement unusable, and that the property interests sought in condemnation were not strictly “necessary” for the East Link Extension. In *Jacobsen*, City Light also challenged Sound Transit’s authority to condemn City Light property in a motion for summary judgment. On January 19, 2017, the trial court entered a revised order finding public use and necessity as to City Light’s Easement interest,² and on December 20, 2016 denied City Light’s motion for summary judgment. Appx. at 3-14. City Light then appealed the PU&N judgment to the Court of Appeals under Cause No. 76252-4-1, and also sought direct discretionary review of the summary judgment denial. Appx. at 15-36. On March 31, 2017, this Court denied City Light’s petition for direct discretionary review of the *Jacobsen* summary judgment denial. Appx. at 37-42. On January 10, 2017 the

² In *Jacobsen*, Sound Transit filed the Declaration of Larry J. Smith in Support of Petitioner’s Reply in Support of Motion for Order and Judgment Adjudicating Public Use and Necessity - City of Seattle, which affirmed Sound Transit’s commitment to work with City Light to preserve its easement interests where possible. *Sound Transit v. Jacobsen*, King County Cause No. 16-2-06769-7 SEA, Dec. 8, 2016, Appx. at 2.

Court of Appeals granted Sound Transit's motion for accelerated review of the Jacobsen PU&N judgment. Appx. at 43-44. City Light's opening brief was submitted to the Court of Appeals on May 18, 2017, and Sound Transit's response brief was submitted to the court on June 19, 2017. On July 19, City Light filed its reply and the parties now await an expedited oral argument setting.

2. The Sternoff Case

In *Sound Transit v. Sternoff L.P.*, King County Cause

No. 16-2-0880-7 SEA ("*Sternoff*"), City Light opposed Sound Transit's Motion for Public Use and Necessity on the same grounds.³ On April 19, 2017, the trial court entered an order finding public use and necessity as to City Light's Easement interest. Appx. at 45-50. On May 18, 2017, City Light filed a Notice of Appeal to the Supreme Court of Washington of the trial court's PU&N Judgment. Appx. at 51-54. City Light's Statement of Grounds for Direct Review and Sound Transit's answer have been filed. The request for direct review remains pending.

3. The Safeway Case

In *Sound Transit v. Safeway Inc.*, King County Cause No. 16-2-

09223-3 SEA ("*Safeway*"), City Light opposed Sound Transit's Motion

³ The *Sternoff* property owner had previously challenged Sound Transit's condemnation on necessity grounds. The trial court's ruling finding public use and necessity as to the owner was affirmed by the Court of Appeals, No. 75372-0-I (Nov. 7, 2016). The Supreme Court denied Sternoff's petition for review, No. 93913-6 (Feb. 8, 2017).

for Public Use and Necessity on the same grounds. On March 27, 2017, the trial court entered an order finding public use and necessity as to City Light's Easement interest. Appx. at 55-59. City Light promptly moved for reconsideration, which the trial court denied on April 14, 2017. Appx. at 60-61. On April 19, 2017, City Light appealed the trial court's PU&N Judgment to the Supreme Court of Washington. Appx. at 62-63. City Light filed its Statement of Grounds for Direct Review on May 8, 2017. Appx. at 64-79. Sound Transit filed its answer on May 22, 2017. Appx. at 80-99. The request for direct review remains pending.

4. The *Spring District* Cases

In addition to this case, Sound Transit filed another action for condemnation of a different set of property interests on the subject parcel. *Sound Transit v. WR-SRI 120th North LLC*, King County Cause No. 17-2-12144-4 SEA ("*Spring District II*").⁴ Sound Transit has filed a Motion for Public Use and Necessity in that case, and City Light has opposed the motion on the same grounds it has argued in the previous cases. Appx. at 100-111, 112-131. The motion has yet to be decided by the trial court.

⁴ Sound Transit filed separate condemnation actions because of anticipated valuation issues relating to the property rights being taken in this case, *Spring District I*, where the light rail station will be located, and because Sound Transit was able to obtain from the Spring District property owner a pre-condemnation Administrative Possession and Use Agreement with respect to the owner's property interests at issue in the other case, *Spring District II*. Filing the two matters separately also provided Sound Transit with the most flexibility for the Project Schedule. Appx. at 136-37.

In each of these cases except for *Spring District II*, which is awaiting a public use and necessity ruling, the trial court has rejected City Light's arguments, ruled that Sound Transit is authorized to condemn public property, and found that City Light's Easement interests are necessary for the East Link Extension.

IV. ARGUMENT

A. SOUND TRANSIT'S ENABLING STATUTE GRANTS IT AUTHORITY TO CONDEMN PUBLIC PROPERTY

The trial court correctly ruled that Sound Transit has statutory authority to condemn publicly owned property, including City Light's Easement. RCW 81.112.080(2) authorizes Sound Transit to condemn "all" property and rights of way necessary for its transit system and supporting facilities. The plain meaning of the word "all" includes public property, and other portions of the same statute confirm that "all" property includes public property. In addition, regional transit authorities building a regional transit system through dense urban areas must be able to condemn publicly owned property to achieve the statutory purpose: a "regional" transit system.

RCW 81.112.080(2) grants Sound Transit broad condemnation authority to support high capacity transportation facilities such as light rail lines. It allows Sound Transit to "acquire by purchase, condemnation, gift, or grant and to lease, construct, add to, improve, replace, repair,

maintain, operate, and regulate the use of high capacity transportation facilities and properties ... together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems.”

Statutory analysis "always begins with the plain language of the statute." *Rest. Dev., Inc. v. Cananwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). On its face, RCW 81.112.080 specifically authorizes Sound Transit to condemn "all lands, rights-of-way, [and] property necessary for such high capacity transportation systems." [emphasis added]. The word "all" represents an express delegation of the power to condemn publicly owned, as well as privately owned property. That is, the legislature expressly refused to limit a Regional Transit Authority's power to condemn based on the nature or ownership of the land or property to be acquired.

Additionally, the statute expressly references "rights-of-way" in its grant of condemnation authority. Because rights-of-way are routinely owned by the state or one of its political subdivisions, the legislature must have intended "all lands, rights-of-way, [and] property" to mean and include publicly owned land. It would not make sense for the legislature to expressly grant condemnation rights over "all ... rights-of-way" if it intended to limit the condemnation authority to only private property.

Finally, the remainder of the statute assumes and confirms that the power to condemn publicly owned property exists. RCW 81.112.080 contains an explicit exclusion for certain types of public property. Certain public property and facilities already used for public transportation may be acquired only by consent. The statute reads, in relevant part:

Public transportation facilities and properties which are owned by any city, county, county transportation authority, public transportation benefit area, or metropolitan municipal corporation may be acquired or used by an authority only with the consent of the agency owning such facilities.

RCW 81.112.080.

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. State ex rel. Department of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P. 2d 736 (1988)). If Sound Transit did not have the power to condemn publicly owned property, there would be no reason to specifically exclude public property already devoted to public transportation. The exclusion itself would be superfluous, meaningless, and unnecessary if Regional Transit Authorities lacked the power to condemn other public property, including other property owned by cities. Thus, the only interpretation that gives meaning to all the statutory

language is that Sound Transit is authorized to condemn city property so long as that city property is not a public transportation facility or public transportation property.

And this makes sense, because the purpose of the Regional Transit Authority statute is to provide for a single entity to plan, develop, operate, and fund a multicounty, high capacity transportation system. *See* RCW 81.112.010. Those "services must be carefully integrated and coordinated with public transportation services currently provided." *Id.* Thus, when a public agency is already using property for public transportation, that property may be acquired or used by a Regional Transit Authority only with the agency's consent. RCW 81.112.080.

City Light claims this reference to public transportation properties is a limited grant of authority to acquire public property, not an exception to the power to acquire "all" property. But the plain language of the clause shows it is an exception, not a grant. The statute provides that publicly owned public transportation facilities and properties "may be acquired or used by an authority only with the consent of the agency owning such facilities." RCW 81.112.080. The word "only" would not be used if the clause were a grant. It is a word of limitation, and shows that absent the clause Sound Transit would have authority to acquire those facilities "by purchase, condemnation, gift, or grant and to lease" under

the prior grant of authority to acquire “all” property. Thus, the exception proves the general rule: that Sound Transit has the broad authority to condemn all property it needs to build its projects, even if the property is publicly owned.

In its brief, City Light asserts that RCW 81.112.080 is silent as to whether Sound Transit is authorized to condemn property owned by cities or other public entities and that such silence means that the statute only delegates power to condemn private property. However, the statute is not silent. The word “all,” in itself, distinguishes Sound Transit's condemnation authority from the county-condemnation statute addressed in the case relied on by City Light, *King County v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966).

In that case, King County sought to condemn a 60-foot right-of-way from an existing road owned by the City of Seattle. The City filed a motion for summary judgment, arguing that King County lacked specific statutory authority to condemn property owned by another municipal corporation. The Washington Supreme Court agreed, based on the language of the authorizing statute, which provides: “[e]very county is hereby authorized and empowered to condemn land and property within the county for public use.” RCW 8.08.010. The Court held that this language did not provide “an express or necessarily implied legislative

authority for counties to condemn the property or rights of the state or any of its subdivisions." *King County*, 68 Wn.2d at 691-92.

But King County's general authority to condemn for public use within municipal limits is much different from the authorization given to RTAs.

First, unlike the authorizing statute in *King County*, RCW 81.112.080 expressly states that as a regional transit authority, Sound Transit has the power to condemn "all lands, rights-of-way, [and] property necessary for such high capacity transportation systems." RCW 81.112.080 [emphasis added]. Second, Sound Transit's authorizing statute provides context regarding the type of property that it is authorized to condemn, demonstrating the legislature's intent to grant Sound Transit the authority to condemn public property. Notably, the statute explicitly authorizes Sound Transit to condemn rights of way, which are routinely property of the state or its political subdivisions. And finally, RCW 81.112.080 specifically precludes Sound Transit from condemning public transportation property owned by cities or other public entities. This exception to Sound Transit's condemnation power would not be necessary unless Sound Transit would otherwise have had that power.

In contrast, the authorizing statute in *King County* contained neither the express authority to condemn "all" property, nor other

references to the condemnation of public property, nor an exception for certain types of public property. The distinctions between the statutes at issue demonstrate why the result here must be different from the result the Supreme Court reached in *King County*.

And the Supreme Court's ruling in *Newell v. Loeb*, 77 Wash. 182, 200, 137 P. 811 (1913), supports this conclusion. In *Newell*, the commissioners of a waterway district sought a right of way to straighten and deepen the Duwamish River. *Id.* at 188. The appellants in the case included the Puget Sound Traction, Light & Power Company and Seattle Electric Company, which owned and operated a steam electrical plant along the river that required a heavy flow of cold water from the river to produce electricity. *Id.* at 197. The water commissioners' project included a dam that would divert the river water away from the electrical plant, requiring a costly pipeline to procure the necessary water. *Id.* at 198. Puget Sound Traction, Light & Power Company argued that it was using the waters of the river for a public use, and the water commission's eminent domain statute did not authorize the condemnation of property already devoted to a public use. *Id.* Like RCW 81.112.080, the commission's eminent domain statute authorized the condemnation of "all" necessary and needed property to improve the waterways. *Id.* at 199. Acknowledging that property devoted to a public use could not be taken

for another public use without express or necessarily implied legislative authority, the Washington Supreme Court held the commission's eminent domain statute conferred the power to take land already devoted to a public use, holding that the use of the word "all" conferred the power "to acquire, either by purchase or condemnation as the commission may see fit, all necessary and needed rights of way." *Id.* at 200.

Likewise, RCW 81.112.080 grants Sound Transit authority to acquire "all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems. RCW 81.112.080(2) [emphasis added]. Thus, under *Newell*, Sound Transit's statute confers the authority to condemn both public and private property, including property already in public use, to effectuate the statutory purpose.

Finally, City Light simply ignores the long line of cases that hold condemnation statutes cannot be construed to defeat the purpose of the granted condemnation authority. Although "statutes which delegate the state's sovereign power of eminent domain to its political subdivisions are to be strictly construed," the power may be conferred "in express terms or by necessary implication;" "a statutory grant of such power is not to be so strictly construed as to thwart or defeat an apparent legislative intent or objective." *State ex rel. Devonshire v. King County*, 70 Wn.2d 630, 633,

424 P.2d 913 (1967) (citing *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965)). The Washington Supreme Court articulated the standard for statutory construction in the condemnation context in

State ex rel. Hunter v. Superior Court for Snohomish County:

"statutes relating to eminent domain are strictly construed, but it is not necessary that such statutes cover in minute detail everything which may be done in order to carry out their purposes. Even though a power may not be expressly given in specific words, if its existence is reasonably necessary in order to effectuate the purposes intended, such power may be implied."

34 Wn.2d 214, 217, 208 P.2d 866 (1949) [emphasis added]. *See also* *Petition of Port of Grays Harbor*, 30 Wn. App. 855, 861-862, 638 P.2d 633 (1982) (citing *State ex rel. Hunter*). Thus, in addition to the condemnation powers expressly conferred, Sound Transit has the authority to condemn public property because that power is "reasonably necessary" in order to effectuate the regional transit authority enabling statute.

The purpose of the Regional Transit Authority statute is to provide for a single entity to plan, develop, operate, and fund a multicounty, high capacity transportation system. *See* RCW 81.112.010. Given the nature of a regional public transportation system, which by definition must span and connect numerous local jurisdictions and cross or abut thousands of properties, including public rights of way, the power to condemn public property is "reasonably necessary" to effectuate the statutory purpose.

Here, City Light would have this Court construe Sound Transit's condemnation authority so strictly as to defeat the purpose of the grant—to enable Sound Transit to design, construct, and operate a comprehensive regional public transportation facility. RCW 81.112.080; see also RCW 81.112.010.

B. CITY LIGHT'S EASEMENT IS NECESSARY FOR THE PROJECT

City Light argues that the property rights Sound Transit seeks cannot be condemned because they are not “necessary” for the East Link Extension. Specifically, City Light argues that Sound Transit cannot condemn aerial easement rights over the Parcel, claiming: “a permanent taking of [City Light’s] aerial rights at 48+ feet above grade, where the existing Transmission Line wires are located, were not necessary to build a light rail line on the ground.” City Light Opening Brief at 25. In City Light’s view, Sound Transit must satisfy a purported statutory standard that every property it condemns is literally indispensable. This, however, flies in the face of Washington condemnation precedent.

Central Puget Sound Regional Transit Authority v. Miller, 156 Wn.2d 403, 128 P.3d 588 (2006), addressed the “necessity” standard in the public use and necessity context while considering Sound Transit’s statutory power of condemnation. The Washington Supreme Court explained that in the first instance it is up to the condemnor to determine

what property is necessary for the project: “Once a state agency with the power of eminent domain has made the initial determination that condemnation is necessary, the matter moves into court for a three-stage proceeding.” *Id.* at 410. *Miller* also analyzed the “necessity” requirement in the court proceeding, holding “a particular condemnation is necessary so long as it appropriately facilitates a public use.” *Id.* at 421. Sound Transit’s public use is construction of a high capacity transportation system. CP 4. *Miller* affirms that under RCW 81.112.080, Sound Transit is authorized to condemn for this purpose even if taking that particular property is not “the best and only way to accomplish a public goal.” *Id.*

In its opening brief, City Light attempts to draw a distinction between the necessity standard articulated in *Miller* and the necessity standard applicable to this case. Opening Brief 25-26. City Light claims that whether the property is necessary for a public use and whether the property is necessary for Sound Transit’s high capacity transportation system are separate questions, with separate definitions of necessity. *Id.* City Light, however, fails to point to any authority whatsoever supporting this distinction. That is because no such distinction exists under Washington law.

Necessity has a very specific, well established meaning in eminent domain law. It does not mean the project could not exist without the

property; rather, it means that the property has been selected for and will actually support a designated public use. *E.g., Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC (NAFTZI)*, 159 Wn.2d 555, 576 ¶ 40, 151 P.3d 176 (2007) (necessity exists if the project fulfills a "genuine need" and "condemnor in fact intends to use the property for the avowed purpose") [internal quotations omitted]. "[A] particular condemnation is necessary as long as it appropriately facilitates a public use." *Sound Transit v. Miller*, 156 Wn.2d at 421 ¶ 36. "Put another way, when there is a reasonable connection between the public use and the actual property, this [necessity] element is satisfied." *Id.*

"Since the turn of the century, Washington courts have provided significant deference to legislative determinations of necessity in the context of eminent domain proceedings." *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 631 ¶ 42, 121 P.3d 1166 (2005). An agency's determination that property is necessary for a public use is conclusive unless the party opposing condemnation shows the determination was arbitrary and capricious, amounting to constructive fraud. *Welcker*, 65 Wn.2d at 684. Thus, Washington's comprehensive body of decisions analyzing what is required to show "necessity" in condemnation proceedings establishes a very different standard from the

"indispensable" standard City Light argues here. There is no reason to believe that when the legislature used the word "necessary" to describe Sound Transit's condemnation authority it meant something different from the longstanding Washington authority about what "necessary" means in the condemnation context.

Sound Transit determined that each of the properties along the light rail alignment was necessary for the project, and authorized acquisition by purchase or condemnation of "all or any portion" of those properties. CP 11. Resolution R2013-21, which authorized the take, specifically determined that the Parcel was "necessary for the construction and permanent location of the East Link Project," and that the acquisition was "for the light rail construction, operation and maintenance in the Bellevue Red Corridor of Bellevue between 120th Ave NE and 148th Ave NE." CP 10.

Based on that evidence, the trial court found that the construction of Sound Transit's East Link Extension will serve a public purpose, is necessary for the public interest, and that the property interests in the Parcel, consisting of the fee simple land and easements being acquired in this condemnation action, are necessary for this purpose. CP 1910. Additionally, the trial court found that there was no fraud, actual or

constructive, no abuse of power, bad faith, or arbitrary and capricious conduct by Sound Transit. *Id.*

The trial court's findings are reviewed under the substantial evidence test. *City of Bellevue v. Pine Forest Properties, Inc.* (hereafter, "*Pine Forest*"), 185 Wn. App. 244, 263-64 ¶¶ 52-53, 340 P.3d 938 (2014), *rev. denied*, 183 Wn.2d 1016 (2015). In *Pine Forest*, the property owner requested the court to review the public use and necessity findings *de novo*. But because "the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings," the court rejected that argument and held the substantial evidence standard of review applied. *Id.* at 264 ¶ 53. The same is true here.

Under the substantial evidence test, the evidence is viewed in the light most favorable to the respondent on appeal. *NAFTZI*, 159 Wn.2d at 576 ¶ 41. Substantial evidence supports a finding if, "viewed in the light most favorable to the respondent," it "would persuade a fair-minded, rational person" that the finding is true. *Miller*, 156 Wn.2d at 419 ¶ 29, [internal quotations omitted]. Thus, to succeed on appeal based on an argument that its Easement is not "necessary" for Sound Transit's project, City Light must demonstrate that the only conclusion a "fair-minded,

rational person" could draw from the evidence is that Sound Transit engaged in arbitrary and capricious conduct amounting to constructive fraud when it determined the Parcel was necessary for its project. This argument fails based on the evidence and the longstanding Washington law discussed below.

Sound Transit's necessity determination was not arbitrary and capricious or fraudulent. As an initial matter, although City Light has challenged whether the aerial rights of its Easement are necessary for Sound Transit's project, City Light has never alleged or put forth any evidence suggesting that Sound Transit's necessity determination was arbitrary and capricious amounting to actual or constructive fraud. And the record is clear that City Light has never challenged Sound Transit's necessity determination on the only grounds upon which a necessity determination may be contested. For this reason alone, the trial court's necessity finding must stand.

Additionally, Sound Transit's legislative determination that the Parcel was necessary for the East Link Extension is, in itself, substantial evidence to support the trial court's necessity finding. *See, e.g., NAFTZI*, 159 Wn.2d at 577 ¶ 42. (board resolution identifying public purpose and selecting property to accomplish that purpose was sufficient); *City of Seattle v. Loutsis Inc. Co., Inc.* (hereafter, "*Loutsis*"), 16 Wn. App. 158,

167, 554 P.2d 379 (1976) (“determination of necessity was for the City to make”); *King County v. Olson*, 7 Wn. App. 614, 619-20, 501 P.2d 188 (1972) (substantial evidence supported necessity of take when agency presented overall plans for park and showed “that open space land within the proposed park area had been selected for acquisition”).

Moreover, as the cases show, demonstrating fraud, bad faith, or arbitrary and capricious conduct is a heavy burden (that City Light has failed to meet). For example, in *In re Port of Seattle*, the owner challenged the Port's necessity determination, claiming it was arbitrary and capricious because "the plans for the use of the property to be acquired are not specific." 80 Wn.2d 392, 398, 495 P.2d 327 (1972). The court rejected the argument. First, the court noted there was a specific public use—air cargo facilities—designated for the property. *Id.* At 398-99. Second, the court held that the lack of "specific or detailed plans for the facilities to be constructed" is insufficient to establish arbitrary and capricious decision-making amounting to the constructive fraud. *Id.*

As in *Port of Seattle*, the designated public use here is clear: "construction, operation, and permanent location of the East Link Extension." CP 11, §§ 3, 4. There is but one necessity standard in the context of eminent domain proceedings and the trial court correctly applied that standard when it found that the subject property, including

City Light's Easement, was necessary for Sound Transit's project.

Because City Light failed to show arbitrary and capricious conduct amounting to constructive fraud, Sound Transit's necessity determination was conclusive, and the trial court's necessity finding must be affirmed.

C. THE PRIOR PUBLIC USE DOCTRINE PERMITS THIS CONDEMNATION

The prior public use doctrine is implicated when a condemnor seeks to condemn publicly owned land that is already devoted to a public use. *See Public Utility District No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 538-40 ¶ 31, 342 P.3d 308 (2015) ("*Okanogan County*"). Under the prior public use doctrine, the condemnor always has the power to condemn such land for a new use compatible with the prior public use. *Id.* Public uses are compatible when the proposed public use will not destroy the existing use or interfere with it to such an extent as is tantamount to destruction. *Id.* at 538-40 ¶ 31 (citing 1A NICHOLS ON EMINENT DOMAIN § 2.17 at 2-58 (Julius L. Sackman ed., 3d ed. 2006)).

In *Roberts v. City of Seattle*, the City of Seattle sought to condemn a 30-foot strip of school property in order to widen a road. 62 Wash. 573, 116 P. 25 (1911). The Washington Supreme Court held that the City could condemn the land even though it had previously been devoted to a public use (education) because there was no indication that the school presently used the land and there was nothing to indicate that taking the land would

impair the school's use of the remaining property. 62 Wash. At 576.

Similarly, in *City of Tacoma v. State*, the court permitted the diversion of river water presently devoted to a public use as a fish hatchery because the proposed diversion did not destroy or critically interfere with such use.

121 Wash. 448, 453, 209 P. 700 (1922).

In this matter, the two public uses are compatible because Sound Transit's public use (high capacity transportation system) does not destroy or interfere with City Light's transmission line over the Parcel. As City Light rightly points out in its briefing to both the trial court and this court, it is "inconceivable" that Sound Transit's project will interfere with City Light's existing electrical transmission wires which will hang some 48+ feet above Sound Transit's light rail line. CP 1050, 1060. City Light's own argument regarding the "necessity" of condemning City Light's aerial easement rights concedes that Sound Transit's use is compatible with City Light's existing public use⁵. Sound Transit's project will be built beneath City Light's transmission system and does not interfere or conflict with its transmission line across the Parcel. The uses are therefore compatible.

To condemn property previously devoted to a public use for a new use that is incompatible with the existing use, requires that the condemnor

⁵ See Russell King Declaration in Support of City of Seattle's Opposition to Petitioner's Motion for Public Use and Necessity and accompanying exhibit, displaying Sound Transit's train built in a "retained cut" configuration. CP 1060, 1063.

have the power to do so either by express statutory language or necessary implication. *Id.* at 539 ¶ 31. Once express or implied statutory authority to condemn a competing public use is established, the court engages in a balancing test to determine the superiority of rights between the competing public uses. *Id.* at 543 ¶ 39.

Here, even if Sound Transit's project called for the destruction of City Light's current transmission line configuration, City Light would be free to design an alternative configuration consistent with its remainder easement. Sound Transit's project takes only a small area west of 124th Avenue NE. The evidence City Light presented to the trial court claims only that there would not be room in the portion of its Easement remaining after Sound Transit's taking to run a 230 kV transmission system. CP 1073. But there is no evidence that City Light's ability to use the remainder easement for ANY electrical transmission system will be destroyed. The compatibility test outlined by the courts asks whether the proposed use will destroy the existing use or interfere with it to such an extent as is tantamount to destruction. *Okanogan County*, 182 Wn.2d at 538-39 ¶ 31. If not, the use is compatible. *Id.* Thus, even if Sound Transit's use would require City Light to reconfigure its transmission line, the prior public use doctrine would not bar the condemnation. Instead,

costs associated with the reconfiguration would be a factor in determining City Light's just compensation⁶

At the conclusion of Sound Transit's project, City Light will still be able to operate its existing transmission system across the Parcel, and will continue to own a substantial electrical utility easement that it may utilize according to its stated purpose. The two uses are thus compatible, and the prior public use doctrine does not bar the condemnation.

D. SEATTLE'S STATUS AS A HOME RULE CHARTER CITY IS IRRELEVANT TO THIS LAWSUIT

City Light's final argument, which was not raised in the trial court, is that Seattle's status as a home rule charter city grants it "complete local self-government in municipal affairs." Opening Brief at 33. Because Seattle's charter grants it a special status, City Light argues, it is superior to limited-purpose agencies like Sound Transit. But other than a high-level overview of the rights of home rule charter cities, City Light provides no case law or analysis supporting this contention. Its argument fails for two reasons.

First, the Parcel at issue in this case is not located in Seattle. It is located in Bellevue, which has been an enthusiastic partner of Sound Transit during the planning and construction of the East Link Extension to

⁶ See *State v. McDonald*, 98 Wn.2d 521, 525-26, 656 P.2d 1043 (1983) (where only part of a single tract of land is taken, the measure of damages is fair market value of the land taken, together with damages to the land not taken).

the Link light rail. Although Seattle may have substantial power over activities within its own borders under its home rule charter, City Light has provided no authority suggesting that such power can be extended beyond Seattle's borders to block a condemnation in another jurisdiction.

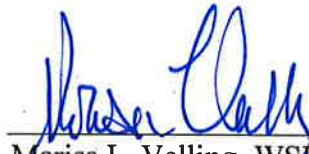
Second, as City Light itself points out, "it is for *the Legislature* . . . to prescribe the relative importance of the governmental unit and the function it performs." Opening Brief at 36 [emphasis added]. City Light is correct. Indeed, the Washington Legislature did just that when it passed Sound Transit's enabling statute and gave Sound Transit permission to condemn "all lands, right-of-way, [and] property necessary for such high capacity transportation systems." RCW 81.112.080 [emphasis added]; *see also* Section IV.A, *supra*. Washington law is clear that "Home rule charter provisions are subordinate to state law." *Washam v. Sonntag*, 74 Wn. App. 504, 509, 874 P.2d 188 (1994). Even if Seattle's charter allowed City Light to bar the acquisition of land outside Seattle's borders, Seattle's authority is subordinate to that granted to Sound Transit by the Legislature. Sound Transit is limited by its statute to what it can condemn for (high capacity transportation). But it was expressly granted broad statutory authority in terms of who it can condemn from (all lands necessary for its purpose). Seattle's status as a home rule charter city is irrelevant to these proceedings.

V. CONCLUSION

For the reasons stated above, the trial court committed no error in concluding that Sound Transit has the statutory authority to condemn City Light's Easement and that there is public use and necessity for the condemned Easement. Sound Transit requests that this Court affirm the trial court's Order and Judgment Adjudicating Public Use and Necessity.

DATED this 24th day of July, 2017.

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